93-573

NO.

Supreme Court, U.S.
FILED
OCT - 7 1993
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In the
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

DENNIS WESTFALL
Petitioner

versus

SOUTHWEST AIRLINES COMPANY
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 7, 1993

QUESTIONS PRESENTED

1. When ruling on a motion for summary judgment in a retaliatory discharge case under Title VII, can the district court define as facts things that never occurred and which are not in the record, and then base the ruling on them?

2. When ruling on a motion for summary judgment in a retaliatory discharge case under Title VII, can the district court declare that affidavits contradictory of each other are really in harmony and then decide the case on such a finding?

3. When an employee has worked as the manager of a company for five years and has been rated by his superiors as performing in a satisfactory manner for the entire time, and when he then validates an EEOC claim of sexual harassment and sexual discrimination against the company and is fired within sixty days, and is told that he actually did a lousy job for several years as manager and they were going to fire him anyway, is this retaliation under Title VII?

LIST OF INTERESTED PERSONS AND RULE 29.1 NOTATION

The parties to the proceedings below were petitioner Dennis Westfall and respondent Southwest Airlines Company. Assuming that this declaration is necessary for an individual, petitioner certifies that he has no corporate parent or subsidiary company to be listed under this Court's Rule 29.1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-

DENNIS WESTFALL
Petitioner

versus

SOUTHWEST AIRLINES COMPANY
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis Westfall, respectfully asks this Honorable Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 9, 1993.

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit, unpublished, is reprinted in the appendix hereto at pages 1a-2a.

The judgment of the United States District Court for the Eastern District of Louisiana is reprinted in the appendix hereto at page 3a.

The order and reasons supporting the judgment of the United States District Court for the Eastern District of Louisiana are reprinted in the appendix hereto at pages 4a-13a.

JURISDICTION

Petitioner Dennis Westfall filed suit on December 6, 1991 in the United States District Court for the Eastern District of Louisiana under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) and La. R.S. 23:1006, alleging retaliation. Furthermore, he alleged age discrimination under 29 U.S.C. § 623(a)(1).

Respondent Southwest Airlines Company answered the lawsuit on April 10, 1992, after which discovery was commenced. Respondent filed a Motion for Summary Judgment on October 13, 1992 on all claims by petitioner. The district judge held a pretrial conference on November 13, 1992, and then signed an order on November 20, 1992 granting respondent's Motion for Summary Judgment. Three days later, on November 23, 1992, the court issued a judgment dismissing petitioner's suit. Petitioner filed a Notice of Appeal on December 2, 1992. Petitioner filed his appeal brief in The Fifth Circuit Court of Appeals on January 19, 1993, invoking the jurisdiction of that court pursuant to 28 U.S.C. §§ 1291, 1294(1), and 1331. The Fifth Circuit affirmed the judgment per curiam on July 9, 1993. Petitioner now invokes the jurisdiction of this Honorable Court under 28 U.S.C. § 1254(1), having filed his petition within the time period provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

STATUTES INVOLVED

A.

Title VII, Section 704(a), prohibiting retaliatory conduct by an employer:

> § 2000e-3. Other unlawful employment practices
> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment , for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USC §§ 2000e - 2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USC §§ 2000e - 2000e-17].

B.

Age Discrimination in Employment Act, 29 USC § 623(A)(1): Prohibition of age discrimination

> (a) Employer practices. It shall be unlawful for an employer -

> (1) to fail or refuse to hire or to discharge any individual or other wise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

Petitioner Dennis Westfall began working for Southwest Airlines in 1983. He held various positions with the company, and in 1986 he was appointed station manager at New Orleans.

Mr. Westfall was responsible for all of Southwest's ground operations at the New Orleans airport. Ground operations include: (1) the operations department, which is responsible for dispatching flights, loading fuel, performing weight and balance calculations on the aircraft, and completing dispatch reports; (2) the ramp department, which is responsible for accepting luggage, loading and unloading freight and baggage, pushing aircraft back for departure, and flagging in aircraft for arrival; and (3) the customer service department, which is responsible for ticketing, checking in passengers at the gate, completing sales reports, and handling air freight.

In early December, 1990, Mr. Westfall was asked by Mr. Leroy Carroll, regional director of ground operations headquartered at Dallas, to investigate EEOC charges of sexual harassment and sexual discrimination filed two weeks previously by Pamela Gendusa, an employee at the New Orleans station.

Petitioner began his investigation and sent Mr. Carroll an interim report stating that the charges were generally unfounded. Later, after further inquiry, he questioned Gene

Harrell, a ramp supervisor. Harrell admitted to Mr. Westfall that he had made an unacceptable remark about "Pam's tits." (In this regard, see the district court's order and reasons for judgment, note 5, reprinted herein at page 9a of the appendix). Mr. Westfall also verified Ms. Gendusa's charge of sexual discrimination when he found that she had received an unfair performance evaluation from Tom Engler, a male supervisor

Dennis Westfall completed his report to Mr. Carroll, recommending that Harrell be terminated and Engler be demoted. Mr. Carroll refused to okay the demotion. Westfall fired both men and was himself fired hardly a month later, on a sudden visit by Leroy Carroll to the New Orleans station.

Petitioner asked why he was being fired, and was told by Mr. Carroll that he had done a poor job as station manager. This explanation lacked credibility, however, and Westfall concluded that the real reason was retaliation for his having verified Ms. Gendusa's EEOC claims. He subsequently filed this lawsuit charging retaliation and age discrimination, after the company replaced him with a younger man.

Under company policy, Mr. Westfall's performance as station manager was reviewed annually by the regional director of ground operations. Leroy Carroll became regional director in October 1989. Prior to that time the regional director had been Phil Gilbert. Above the regional director was Jim Wimberly, the vice-president for operations.

Petitioner was evaluated by Gilbert and Carroll under this system four times as station manager, and on each occasion he was rated above 3.0 on a scale from one to five. A rating between 3.0 and 4.0 was considered sufficient to qualify a station manager as competent to do the job.

REASONS FOR GRANTING THE WRIT

I.
THE DISTRICT COURT'S HOLDING THAT DENNIS WESTFALL WAS FIRED FOR REASONS OTHER THAN RETALIATION WAS PLAINLY WRONG

Petitioner, Dennis Westfall, was terminated by Southwest Airlines Co., the respondent, because he investigated EEOC claims of sexual harassment and sexual discrimination filed by an employee and found that the claims were valid. The company is very sensitive concerning its image, and was greatly embarrassed by this finding. They fired Dennis Westfall in retaliation, even though he himself had already fired the employees who were responsible. Southwest then set about to justify its action against the petitioner by making frivolous claims about his alleged lack of leadership, in spite of the company's own documentation to the contrary.

The district court granted summary judgment on Southwest's motion, but the court's opinion shows that it misinterpreted and misapplied the law. Furthermore, the court omitted certain facts in its opinion while at the same time accepting as fact events that never occurred. The Fifth Circuit erroneously ratified these findings without comment. The result is a compounding of error upon error, to such an extent that this Honorable Court is now the petitioner's last resort.

A. The Writ Should be Granted Because The Court Exceeded its Authority by Redefining the Record

The district court held that Southwest had a legitimate, nondiscriminatory reason for firing Mr. Westfall, due to "his lack of leadership and the deteriorating morale among employees at the New Orleans station." (Appendix at 8a). But

in reaching this conclusion the court redefined the reality of the record.

Mr. Westfall was never rated below satisfactory

Factual errors by the court abound. The opinion says at page 5a: "The plaintiff's performance was rated below satisfactory in his 1988 evaluation. And in 1990, the plaintiff's performance was below par, rated as problematic."

This is not, repeat, *not* true. Dennis Westfall became station manager in 1986, and at *no time* from day one to the day of his discharge was he *ever* rated below satisfactory. On this matter the court is flat-out wrong.

Petitioner's management performance appraisal sheets from the Southwest Airlines Company are in the record. The legend printed on these sheets states that a rating of three "Meets job requirements expected of experienced, fully qualified individuals." In September 1986 Mr. Westfall was rated 3.5. In November 1987 he was rated 3.6. In December 1988 he was rated 3.29. In January 1990, the next rating that was taken, petitioner was given a 3.4, *up from the previous year*. On this last rating, the attached sheet says, "Dennis supports Southwest in a very positive manner. Attendance, appearance, attitude, and cooperation is excellent."

This goes to the very gut of Southwest's argument. They say they had a legitimate, nondiscriminatory reason for firing Mr. Westfall based on his "unsatisfactory" performance. But if they themselves rated his performance within satisfactory limits, *how can the court hold to the contrary?*

This error goes to the essence of the summary judgment process. This Honorable Court said:

> [A]t the summary judgment stage the judge's function is *not himself to weigh the evidence* and determine the truth of the matter but to determine whether there is a genuine issue for trial (emphasis added).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249; 106 S.Ct. 2505, 2511 (1986). If the court is not even allowed to *weigh* the evidence, on what authority can it *contradict* it?

Plainly the court was wrong in this ruling. There was a genuine issue as to the material fact of Mr. Westfall's job performance. The existence of this issue shows that he carried the burden of proving that the articulated reason for his firing was a pretext for the retaliation against him.

The affidavits were not uncontradicted

The court continued to redefine the record. Further "evidence" of petitioner's poor job performance was mischaracterized in the opinion. The court said: "The company points to the uncontradicted affidavit testimony of various station employees as evidence of the plaintiff's unsatisfactory management." (Appendix at 8a).

The "uncontradicted" affidavits referred to by the court were indeed contradicted by affidavits on behalf of petitioner. These documents are reprinted in the appendix. This Honorable Court can read for itself the extent to which the judgment differs from reality.

Beth Frey was employed by Southwest from 1981 to 1992 when she left work to be at home with her family. She worked under Mr. Westfall and those who both preceded and succeeded him. She said, among other things, that morale was good and bad at different times regardless who was there.

The affidavit says,

> In late October 1990 she returned to work after the birth of her baby. She believes that from that point in late October 1990 until February 1991 under Mr. Westfall that *morale was fine* (emphasis added).

(Appendix at 15a). This was the very same time that Mr. Carroll was supposedly in such great distress concerning low morale at the New Orleans station. Beth Frey also said that she frequently observed Mr. Westfall *in the station and in the ticket area.*

Jorge Aleman, who began working for Southwest in 1989 and was still employed there at the time of this affidavit, said, among other things, that morale under Dennis Westfall was average (Appendix at 17a). He said that, beginning in March 1990, the ramp was running smoothly and in December 1990 "conditions and morale were fine." Jorge Aleman's affidavit also said:

> He saw Mr. Westfall on the ramp frequently during 1990 even though Mr. Westfall's office was located away from the ramp and operations area, unlike its present location. He noticed that Mr. Westfall worked on the ramp a few times with different shifts, in particular during the summer of 1990 and in November or December 1990.

(Appendix at 17a). Dennis Westfall was fired in February 1991 for supposedly being "invisible," even though Jorge Aleman saw him at work within the previous ninety days.

Obviously, these affidavits *contradict* the affidavits relied on by the court. The material facts of petitioner's

management performance and of morale among the employees are very much at issue here. Plainly, these questions should have gone to the jury.

Dennis Westfall personally fired Harrell and Engler

The court minimizes petitioner's role in the EEOC complaint in its opinion when it says:

> In Westfall's own interoffice memo to Carroll after his investigation of Gendusa's complaint, he favorably concluded that "[g]enerally, there was no validity to the majority of her complaints." His report was predominantly supportive of the airline.

(Appendix at 9a).

The court infers here that petitioner couldn't have been fired due to the investigation because his part in it was insignificant. This fails on two grounds. The first is that the memorandum referred to above was an interim memorandum written before the investigation was complete. Later, when Mr. Westfall had verified that both Gene Harrell and Tom Engler had indeed done the things Pam Gendusa accused them of doing, he informed Mr. Carroll that Harrell should be terminated and Engler should be demoted.

Second, petitioner couldn't get approval for Engler's demotion, so it was Dennis Westfall himself who actually terminated both men. Thus it can hardly be said that he had an insignificant role in this episode. He was the central player and the one who validated Pam's complaint.

B. The Two Remaining Sham Issues Have No Merit

In its opinion, the court said:

> In his deposition testimony, the plaintiff candidly acknowledged that he agreed with the critical appraisal and conceded that he needed to display a more aggressive management style. . . His admissions about his own performance stand out starkly in this dispute.

(Appendix at 10a).

Dennis Westfall never denied that there was room for improvement in his job performance. He never contested his ratings at the 3.0 to 3.5 level because he knew they were accurate. Nonetheless, he did a consistently good job within his capabilities.

It is a sham for Southwest Airlines to assert that this candidness is a justification for petitioner's termination. To begin with, they rated him as an average manager from the very beginning of his tenure, but they never informed him that his job performance was less than satisfactory.

Secondly, in his final rating in January 1990, he was rated *higher* than he was the year before. He went from 3.29 to 3.40, and this increase was given to him by Leroy Carroll.

Third, the record plainly shows that in comparison with other station managers in the Southwest system, Mr. Westfall's ratings were typical. His job performance was neither better nor worse than that of the normal manager.

Accordingly, petitioner's acknowledgement of his own ratings level is a sham issue at best.

The second sham issue is the matter of the provisioning stand. Mentioned by the court at pages 5a and 10a of the appendix, this incident occurred a full year before the question of Pam Gendusa's EEOC complaint arose. The company was hardly upset at all. Mr. Westfall received a memorandum on the subject and it was never mentioned again. He didn't have to file a report or make an explanation.

C. The Writ Should Be Granted Because Petitioner Carried His Burden of Proof

After Southwest articulated their supposedly legitimate reasons for terminating him, Dennis Westfall successfully showed that these reasons were a pretext for retaliation. He also showed that "but for" his validation of the EEOC charges, he would not have been fired.

The reasons given were a pretext.

* Petitioner's job ratings were never less than satisfactory. Southwest claimed his job performance was substandard as an excuse to fire him. This has to be a pretext, since in past years the same ratings had been considered acceptable.

* Southwest's affidavits were contradicted. Their affidavits attacked petitioner but his affidavits defended him. These slurs were merely a cover for the company's retaliatory action.

* Petitioner played a central role in the EEOC investigation by validating the charges and personally firing those who were responsible. It is truly a pretense to assert that he must have been fired for poor job performance, since he hardly did anything in the investigation. He was the star of that particular show (and they know it).

* Petitioner's acceptance of his ratings was not a "confession of judgment" but rather an acknowledgement of his capabilities. Dennis Westfall is an honest man, a good man, who took no refuge in denial or deception. It is the pretense of all pretenses to label his honesty as an admission of incompetence. Besides, the company's own ratings would contradict such a label.

* The incident with the provisioning stand was never a reason to fire Mr. Westfall. He received a bland, business-like memorandum from Mr. Carroll and that was the end of it. If they were going to fire him for that incident, they would have done so at the time it happened. Yet, a full year later, immediately after petitioner had embarrassed the company by validating an EEOC complaint against it, Southwest suddenly brought out this incident as a sham excuse for his termination. It is indeed pretextual.

These rebuttal arguments reveal the pretense for what it really is. Summary judgment was plainly wrong and should be reversed.

Petitioner would not have been fired "but for"

In a retaliation lawsuit, the plaintiff must demonstrate that "but for" the protected activity, the employer would not have taken the adverse action. This is easily done in the present case, given the otherwise stable position Mr. Westfall enjoyed.

Petitioner had been the New Orleans station manager for Southwest Airlines for five years. His ratings were steady, his knowledge of the company and its ways was thorough, and he had not encountered any big problems. Management, while always prodding its employees to improve, had made no major threats concerning the loss of his job. Then Mr. Westfall was

given Pamela Gendusa's EEOC claim to investigate, and sixty days later he was history.

The company said that he was on the edge, had been on the edge for years, and they were going to fire him anyway, but, everything taken in context, that's a pretty lame story. They rummaged through petitioner's file and brought out every tiny imperfection to justify his termination. He was an easy target, too, because when you're rated average, that means there are lots of things you need to improve on. Even with this advantage, Southwest produced precious little justification.

We urge this Honorable Court to consider the uneventful way this man's life as station manager had gone, prior to the arrival of the EEOC claim. We urge this Court to take a little time and read the affidavits in the appendix to see what a phony issue this "morale" problem really was. Those affidavits show that this is the most *routine* stuff, the kind of thing that businesses wrestle with every day, all around the world.

The "morale" issue becomes even less believable in light of the fact that Leroy Carroll gave Dennis Westfall a *higher* grade in 1990 than he received in 1989, and while he was at it, Mr. Carroll wrote in the file that "Dennis supports Southwest in a very positive manner. Attendance, appearance, attitude, and cooperation is excellent." *Excellent*. That's what the man wrote. In the context of the steady job that Mr. Westfall did, it was most likely true.

The inevitable conclusion is that "but for" his validation of Pamela Gendusa's EEOC claim, Southwest would not have fired Dennis Westfall from his job. Accordingly, petitioner has carried his burden, and the summary judgment should be reversed.

D. The Writ Should Be Granted Under This Court's Rule 10.1(a)

This is an instance in which the United States Court of Appeals has departed sufficiently far from the accepted and usual course of judicial proceedings by sanctioning such a departure by a lower court as to call for an exercise of this Court's power of supervision.

The district court plainly exceeded its authority in the handling of this case. The court essentially "tried" the case and made rulings that *created* "facts" that never existed.

This was a motion for summary judgment, but the court delivered an opinion that found facts as though there had been a real trial. No witnesses were sworn and no testimony was taken, but the court defined reality with little regard for the contents of the record.

This kind of procedure could shut down retaliation cases on a permanent basis. It has certainly shut down Dennis Westfall's case, even though the facts favor his position.

The question before the court was whether there was a genuine issue as to material facts, but the result goes far beyond that basic consideration. This is a serious matter, all the more so because the Fifth Circuit Court of Appeals sat by silently and let it happen. The entire record was available to that court, and all of the contentions made in this petition were made on the appeal. Still, they affirmed per curiam.

Petitioner respectfully urges this Honorable Court to grant certiorari and see for itself the wide difference between the district court's findings and the evidence.

II.
THE DISTRICT COURT'S DENIAL OF PETITIONER'S AGE DISCRIMINATION CLAIM IS NOT SUPPORTED BY THE RECORD

The court correctly set out the applicable law, and then said:

> In this case, the plaintiff establishes his prima facie case by his showing that he did satisfy the requirements for a supervisor's position. He adds that at the time of his discharge, he was forty-four years old; he was replaced by a thirty-nine year old.

(Appendix at 12a).

There's a factual error as to the age of petitioner's replacement. The true age of that gentleman was not 39 but 32, and this was stipulated by counsel. We expect that Southwest's attorneys will verify this in their response.

The district court then went on to say:

> The defendant counters with the same facts about Westfall's poor performance. The plaintiff challenges this explanation, invoking the required argument that it is a pretext for unlawful discrimination. But the plaintiff's story contradicts his own deposition testimony in which he admitted his negative performance evaluations were not related to his age.

(Appendix at 13a).

Petitioner asserts all of the arguments previously made in support of his job performance. He rebuts, however, the court's mischaracterization of his deposition testimony.

Dennis Westfall received *no* negative performance evaluations from Southwest Airlines. His yearly total ratings were all between 3.0 and 3.5. In individual categories, he was occasionally rated below 3.0 (but not by much). Since his ratings were average, there were obviously things that he needed to improve, and he admitted that.

The court's mischaracterization, however, occurred with the statement that "he admitted his negative performance evaluations were not related to his age." (Appendix at 13a). This statement implies a criticism of the ratings by Dennis Westfall, but he always considered them to be fair. He took the ratings the way they were intended, as an accurate grading of a person's performance and a guide to improvement.

The court's statement makes it seem like the petitioner felt wronged by his ratings and that he took a hostile attitude toward the system. This is not in any way the case. He simply accepted them.

Since he felt the ratings were fair, petitioner readily testified at his deposition that they were not related to his age. Of course they weren't. They were related to performance.

But the court's mischaracterization also implies that Mr. Westfall brought this lawsuit to protest the ratings, and that he damaged his legal position by testifying that they were not related to his age. That's not the basis of the suit at all. The suit says it was his *firing* that was related to his age, an entirely different assertion.

Southwest's age prejudice against Dennis Westfall is evidenced by the fact that they refused to demote him to

another position. Demotion, usually considered a negative event, is quite ordinary at Southwest. It does not hurt an employee's standing and does not reflect poorly on a person's job performance. Many Southwest employees actually *volunteer* to be demoted.

The record shows several instances of station managers being demoted rather than fired. It is an option the company uses to keep good people who find themselves in jobs they are not fully capable of handling. Dennis Westfall was denied this option due to his age.

In keeping with the spirit of this Honorable Court's rules, we will not lengthen this petition to include a chronicle of at least half a dozen instances in which Southwest demoted people rather than fire them. Suffice it to say that the record contains abundant evidence of this practice.

We will, however, point out a holding in a landmark Fifth Circuit case. That decision said:

> In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder (citations omitted).

Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 640 (5 Cir. 1985).

Dennis Westfall was replaced by a much younger man and was treated differently from other company workers by

not being allowed to take demotion in place of being fired. Accordingly, Southwest's assertions that he was fired for poor performance are pretextual, and the question should have gone to trial on the merits.

CONCLUSION

For the reasons set forth above, petitioner prays that this Honorable Court grant his petition for certiorari to address these important issues concerning the conduct of federal litigation, and to bring justice to a decent man.

Respectfully submitted,

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APPENDIX

IN THE UNTIED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9522

DENNIS WESTFALL
Plaintiff-Appellant

versus

SOUTHWEST AIRLINES COMPANY
Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed July 9, 1993;
Issued as Mandate August 2, 1993)

Before KING and JOLLY, Circuit Judges, and PARKER, District Judge[1]

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[1]Chief Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:[2]

AFFIRMED. See Local Rule 47.6

Costs on appeal are to be taxed against plaintiff-appellant.

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[2]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-4430

Section "F"

DENNIS WESTFALL

versus

SOUTHWEST AIRLINES COMPANY

JUDGMENT

(Filed November 24, 1992;
Date of Entry November 24, 1992)

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Southwest Airlines, Inc., and against plaintiff, Dennis Westfall, dismissing plaintiff's suit.

New Orleans, Louisiana, this 23rd day of November, 1992.

/S/ Martin L. C. Feldman
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-4430

Section "F"

DENNIS WESTFALL

versus

SOUTHWEST AIRLINES COMPANY

ORDER AND REASONS

(Filed November 20, 1992;
Date of Entry November 20, 1992)

Before the Court is the defendant's motion for summary judgment. For the reasons that follow, the motion is GRANTED.

I. BACKGROUND

Southwest Airlines employed the plaintiff, Dennis Westfall, in December 1983. By 1986, Westfall had been promoted to the position of New Orleans station manager. As station manager, he was responsible for all ground operations

at the New Orleans airport.[1] Under company policy, his performance as a supervisor was reviewed annually by the Regional Director of Ground Operations. While reviewing the written personnel performance evaluations and audit reports for the stations under his supervision,[2] Carroll began to question the caliber of Westfall's performance at the New Orleans station.

The plaintiff's performance was rated "below satisfactory" in his 1988 evaluation. And in 1990, the plaintiff's performance was below par, rated as problematic.

Widespread dissatisfaction with the plaintiff's management and maintenance of the New Orleans station persisted. Worker morale suffered, and the employees often referred to Westfall as the "invisible manager" and "Mr. Mustfall." In addition, Carroll learned that a provisioning stand with an exposed metal contact point punctured the surface of a Southwest aircraft at the New Orleans station. Carroll noted that the incident, which required the cancellation of a flight and structural repairs to the aircraft, reflected badly on

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[1] Ground operations include: (1) the operations department, which is responsible for dispatching flights, loading fuel, performing weight and balance calculations on the aircraft, and completing dispatch reports; (2) the ramp department, which is responsible for accepting luggage, loading and unloading freight and baggage, pushing aircraft back for departure, and flagging in aircraft for arrival; and (3) the customer service department, which is responsible for ticketing, checking in passengers at the gate, completing sales reports, and handling air freight.

[2] Each station manager's work performance is evaluated in an annual review. In addition, Southwest's audit department conducts a yearly audit of each station and does a report.

Westfall because the function of a station manager is to prevent such accidents.

During this time, Southwest received an EEOC complaint alleging sex discrimination and harassment by Pam Gendusa, an operations agent at the New Orleans station. Ms. Gendusa addressed her letter of complaint to Carroll, charging that she was taunted at work and that she had received unfair performance evaluations. She added that Westfall had failed to respond to her complaints and that he had threatened her several times for taking her problems to higher authorities. Nonetheless, Carroll asked Westfall to investigate the discrimination charges, and Westfall concluded that "a majority of Gendusa's claims lacked validity."

In February 1991, Carroll discussed the problems at Southwest's New Orleans station with Jim Wimberly, the Vice-President of Ground Operations and Provisioning, and Ann Rhoades, Vice-President of Personnel. The threesome agreed that Westfall did not show the level of concern for company operations which Southwest expected of its employees, and they concluded that termination was appropriate.

Carroll fired Westfall in mid-February, explaining that he had failed to provide the type of leadership and management that Southwest expected of its station managers. The plaintiff asked for a demotion, but Southwest refused to retain him in any capacity. Westfall was forty-four years old at the time of his discharge; he was replaced by a thirty-nine year old.

Westfall filed suit against the defendant, alleging age discrimination and retaliatory discharge.[3] The defendant now

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[3] The plaintiff alleged violations of both federal and state anti-discrimination laws. *See* U.S.C. § 2000e *et seq*; La. R.S. 23:971 *et seq*.

moves for summary judgment, asserting that the plaintiff's claims are baseless.

II. LAW AND APPLICATION

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere argued existence of a factual dispute does not defeat an other wise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted). Summary judgment is proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Retaliatory Discharge

First, the Court considers the plaintiff's claim of retaliatory discharge.

Section 704(a) of Title VII prohibits retaliatory conduct by an employer. The statute specifically provides:

> It shall be unlawful employment practice for an employer to discriminate against any of his

> employees ... because he has made a charge ... [under Title VII].

42 U.S.C. §2000e-3(a).

To establish a prima facie case of retaliation, a discharged employee must show: (1) that he engaged in an activity protected under Title VII; (2) that he suffered an adverse employment action; and (3) that a causal connection existed between the protected activity in which he engaged and the adverse action. *McDaniel v. Temple Independent School Dist.*, 770 F.2d 1340, 1346 (5 Cir. 1985); *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5 Cir. 1983). If the plaintiff succeeds in establishing a prima facie case, the evidentiary burden shifts to the employer, who must then produce a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.*

The ultimate burden of proof, however, rests with the plaintiff. The plaintiff must prove that the employer's articulated reasons for dismissal were merely a pretest for the retaliation. *Id.* He must also demonstrate that "but for" the protected activity, the employer would not have taken the adverse action. *Id.*

In this case, Westfall was fired shortly after investigating Ms. Gendusa's EEOC charge. He asserts that the brief time frame between the events establishes a causal connection. Westfall also charges that after he reported to Carroll, Southwest fired the two implicated supervisors, but did not provide the EEOC with any written information. And he calls to the Court's attention that on the date of his termination, one of the fired supervisors returned to work for Southwest.

Southwest, however, responds that the plaintiff was fired for his lack of leadership and the deteriorating morale among employees at the New Orleans station. The company

points to the uncontradicted affidavit testimony of various station employees as evidence of the plaintiff's unsatisfactory management.[4]

The plaintiff challenges the company's explanation by asserting that but for his participation in the EEOC investigation, he would not have been fired. He claims that his discharge was purely retaliatory because he had substantiated "significant elements of Gendusa's EEOC claim. These claims are without basis, on this record.

In Westfall's own interoffice memo to Carroll after his investigation of Gendusa's complaint, he favorable concluded that "[g]enerally, there was no validity to the majority of her complaints."[5] His report was predominantly supportive of the airline.

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[4] Peter Alongia, Ronnie Malinosky, John McGrath, Brian Plaisance, and Kurt Schellhaas all state that Westfall was known as "the invisible manager" and "Mr. Mustfall" among station employees because he was rarely available to provide leadership or guidance when problems occurred. That Westfall was cautioned about his performance long before his termination or his involvement in the Gendusa incident is beyond contradiction.

[5] He did note that he found a difference in opinion among supervisors regarding Gendusa's job performance. And he later discovered that one of the supervisors who was present during Gendusa's negative performance evaluation had stated that he wanted another supervisor to sit in so "Pam won't say I grabbed her tits." However, the two supervisors whose behavior was at issue in the EEOC investigation were also under company investigation for non-related charges, including observing stolen company property at a Southwest employee's home and making derogatory statements about the company.

This record supports a finding that the defendant had proper, nonretaliatory reasons for discharging the plaintiff. In 1988, the plaintiff's work performance was rated below satisfactory in the area of maintaining control over company resources and monitoring expenditures. In his deposition testimony, the plaintiff candidly acknowledged that he agreed with the critical appraisal and conceded that he needed to display a more aggressive management style.

The plaintiff also agreed with a 1990 appraisal which criticized his handling of problem employees. And he admitted that the areas which his supervisor targeted for improvement had been identified by prior managers. His admissions about his own performance stand out starkly in this dispute.

Other evidence of dissatisfaction with the plaintiff's management and maintenance of the New Orleans station exists. The affidavit testimony of various station employees establishes: (1) that worker morale at the New Orleans station suffered under Westfall's leadership; and (2) that he clearly lacked the respect of his subordinates, who frequently referred to him by demeaning nicknames that mocked his leadership.

Finally, the incident about the damaged provisioning stand further strengthens Southwest's performance-related termination reasons. Southwest management determined that this incident, which required the cancellation of a flight and structural repairs to the aircraft, reflected poorly on Westfall. And so, the record is dominated by a series of criticism of plaintiff's job performance, long before the EEOC affair he urges was his downfall.

Plainly, the sum of the evidence says that Southwest had nonretaliatory reasons for Westfall's dismissal, and the plaintiff has acknowledged that his negative reviews were not unfounded. Thus, the Court finds that the plaintiff has failed

on this record to meet the requisite "but for" burden of proof for his retaliation claim.

C. Age Discrimination

Next, the Court turns to the plaintiff's alternative claim of age discrimination.

The Age Discrimination in Employment Act expressly prohibits disparate treatment of employees based on age. Section 623(a) of the Act states:

> It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. §623 (a)(1).

The burden of proof in suits involving alleged discriminatory treatment under Title VII is well established.[6] *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). To establish a prima facie case of age discrimination, one must show: (1) that he was discharged; (2) that he was qualified for

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[6] The Fifth Circuit has held that the same burden of proof applies under the Louisiana Age Discrimination Statute, La. R.S. 23:971. *See Deloach v. Delchamps, Inc.*, 897 F.2d 815, 818 (5 Cir. 1990).

the position; (3) that he was within the protected class[7] at the time of discharge; and (4) that he was replaced by someone outside the protected class[8]. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504-5 (5 Cir. 1988). If the plaintiff is successful, the burden of production shifts to the defendant to rebut the presumption of discrimination by offering a legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff. *Id.*

To prevail on his claim, as in the case of the retaliation claim, the plaintiff must again demonstrate that the defendant's articulated reason is simply a pretext for unlawful discrimination. *Id.* The plaintiff may prove his case either by showing that a discriminatory reason more likely motivated the defendant, or by showing that the defendant's reason is unworthy of belief. *Id.*

In this case, the plaintiff establishes his prima facie case by his showing that he did satisfy the requirements for a supervisor's position.[9] He adds that at the time of his discharge, he was forty-four years old; he was replaced by a thirty-nine year old.

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[7] The ADEA provides statutory protection to individuals between the ages of forty and seventy. 29 U.S.C. §631(a).

[8] He may alternatively show that he was replaced by someone younger or present any other evidence to show that his discharge was due to age.

[9] He emphasizes that two supervisors assessed his 1988 and 1989 performance evaluations as meeting the qualifications for leadership; and he points out that in the notes made by supervisor Nona Rogers during Westfall's exit interview from Southwest, his former manager stated that "their (sic) were minor individual problems, but no wholesale problems."

The defendant counters with the same facts about Westfall's poor performance. The plaintiff challenges this explanation, invoking the required argument that it is a pretext for unlawful discrimination.

But the plaintiff's story contradicts his own deposition testimony in which he admitted his negative performance evaluations were not related to his age. Indeed, his deposition indicates that not only did Westfall decline to challenge his poor performance reviews, but he openly agreed with his supervisor's criticism and personally acknowledged the problems.

The Court is satisfied, according to the standards mandated for summary judgment, that Southwest's reasons for firing Westfall are not simply pretextual. Moreover, the plaintiff has neither shown that another explanation for his firing is more likely nor that the offered explanation is not believable.

Thus, the Court concludes that the plaintiff has failed to carry his burden of proof on the issues of retaliatory discharge and age discrimination. The evidence betrays plaintiff's assumptions; no reasonable jury could find for the plaintiff on this record. And because no genuine issues of material fact exist, the summary judgment motion of Southwest Airlines is GRANTED.

New Orleans, Louisiana, November 19, 1992.

/s/ Martin L. C. Feldman
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-4430

Section "F, "Magistrate "4"

DENNIS WESTFALL

versus

SOUTHWEST AIRLINES COMPANY

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared Beth Frey, 21 Rail Street, New Orleans, Louisiana, who, upon being duly sworn, did depose and say the following:

She began working for Southwest Airlines in 1981 as a customer service, or ticket, agent. She continued to work for Southwestern this capacity in New Orleans until July 1992 when she decided to quit after the recent birth of her baby to take care of her young children. She was the union representative for the ticket agents, IAM, during the tenure of Mr. Westfall and Mr. Hafner.

She served under three different station managers with Southwest Airlines: Dan Wilkinson, Dennis Westfall, and

Mike Hafner. She recalls that morale was bad during Mr. Wilkinson's tenure. She remembers that employees suspected among themselves that Mr. Wilkinson tape recorded conversations with them without their knowledge and that they thought that he listened in on their telephone conversations without their permission.

During her tenure with Southwest, she observed that morale at the New Orleans station generally would peak when a new station manager took over the station and then would return to a low level. She noticed that an improvement occurred when Mr. Westfall took over the station from Mr. Wilkinson and when Mr. Hafner took over after Mr. Westfall's termination. However, this improvement in morale did not last and the morale fluctuated between good and bad at different times under Mr. Wilkinson, Mr. Westfall and Mr. Hafner. In late October 1990 she returned to work after the birth of her baby. She believes that from that point in late October 1990 until February 1991 under Mr. Westfall that morale was fine.

When she worked for Southwest under Mr. Westfall, she frequently observed Mr. Westfall in the station and in the ticket area. However, when she was working for Southwest under Mr. Hafner, she often did not see Mr. Hafner in the ticket area. Approximately one month before she stopped working for Southwest, she observed another customer service agent make and obscene gesture as Mr. Hafner passed through the airport. She asked the agent why she had done this and the agent replied that Mr. Hafner did not care about the agents and that he did not know what was going on since he was rarely seen at the ticket counter.

/s/ Beth Frey

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9th DAY

OF November, 1992

/s/ Dwan S. Hilferty
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-4430

Section "F, "Magistrate "4"

DENNIS WESTFALL

versus

SOUTHWEST AIRLINES COMPANY

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared Jorge Aleman, 1312 East Drive, Westwego, Louisiana, who, upon being duly sworn, did depose and say the following:

He began working for Southwest Airlines on February 26, 1989 as a ramp agent, which is his present position. In his capacity as a ramp agent, he has worked all three shifts.

Under Dennis Westfall, he considered morale to be average, although there were some people who would complain about anything. Beginning in about March 1990, he observed that the ramp was running smoothly, especially after some more mature individuals had been hired. In December 1990, he observed that conditions and morale were fine.

He saw Mr. Westfall on the ramp frequently during 1990 even though Mr. Westfall's office was located away from the ramp and operations area, unlike its present location. He noticed that Mr. Westfall worked on the ramp a few times with different shifts, in particular during the summer of 1990 and in November or December 1990.

He never heard employees refer to Mr. Westfall as "Mustfall," although he did hear some ramp and operations agents call him the "Invisible Manager." He recalls that it seemed that these derogatory names were given by Kurt Schellhaas.

However, the current station manager, Mike Hafner, also is criticized by ramp and operations agents for allegedly being absent from the station or not in their department even more so than they claim that Mr. Westfall was. Mr. Hafner now is called the "Invisible Manager" by ramp and operations agents. Nearly all of the ramp and operations agents speak poorly of Mr. Hafner. He has observed that some employees consider morale at the New Orleans station to be bad and they are not satisfied with Mr. Hafner or the supervisors. They claim that Mr. Hafner is two-faced, wishy-washy and that he cannot be trusted.

At one point, the operations agents objected to a schedule change made by the current operations supervisor, Mr. Schellhaas. Approximately six to seven new agents tried to have Mr. Schellhaas transferred by signing a petition to change the schedule and remove Mr. Schellhaas. Mr. Hafner changed the schedule for the agents. Although Mr. Hafner had claimed that Mr. Schellhaas would be switched to a different department, this was not done.

There were problems between John McGrath and the other supervisors, including the ramp, when he was at the New Orleans station, even when Mr. Hafner was station manager.

Approximately six to seven months ago, while Mr. Hafner has been the station manager, there were rumors of a complaint of sexual harassment made by a black female customer service agent against a black operations agent. According to the rumors in the station, she alleged that [she] did not receive assistance from the management in the New Orleans station, that she contacted the Southwest headquarters and she may have filed an EEOC charge.

/s/ Jorge Aleman

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 11th DAY
OF November, 1992.

/s/ Dwan S. Hilferty
NOTARY PUBLIC